Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

TARCHIA RANKINS, et al,
Petitioners,

v.

LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED

Does the State of Louisiana in its administration of the Louisiana Graduation Exit Exam discriminate against a certain class of high school students in violation of their equal protection rights guaranteed by the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Louisiana Supreme Court are Tarchia Rankins, Chad Yancy, Sonovia Hicks, Sekari Williams and Kawanda Beauchamp, petitioners. The Louisiana State Board of Elementary and Secondary Education, respondent.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court on a nationally important matter relating to the equal protection clause of the U. S. Constitution regarding the administration of the state's graduation requirements.

OPINIONS BELOW

The decision and written reasons of the Louisiana Nineteenth Judicial District Court in Appendixes C and D. The decision of the Louisiana First Circuit Court of Appeal in Appendix B. The Louisiana Supreme Court denied

Petitioners' application for writ of certiorari on April 12, 1994 in Appendix A. All opinions are unreported.

BASIS FOR JURISDICTION

The final judgment of the Louisiana Supreme Court was entered on April 12, 1994. This Court has jurisdiction to review the judgment of the Louisiana Supreme Court 28 U.S.C. Section 1257, as amended.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, provides, in relevant part, that a state is forbidden to "...deny to any person within its jurisdiction the equal protection of the laws...".

STATEMENT

Petitioners, Tarchia Rankins, Chad Yancy, Sonovia Hicks, Sekari Williams, and Kawanda Beauchamp, students who attended public high schools in the State of Louisiana, filed suit in the Louisiana Nineteenth Judicial District Court, seeking a declaratory judgment regarding the State of Louisiana's administration of the Graduation Exit Exam (hereinafter referred to as "GEE").

Petitioners also sought injunctive relief against the respondent to restrain, enjoin and prohibit it from preventing any student, who has successfully completed all requirements for graduating from a Louisiana public school, with the exception of passing the GEE, from receiving a diploma and participation in graduation ceremonies.

The main basis of petitioners' lawsuit asserted a U. S. Constitutional claim that the Louisiana State Board of Elementary and Secondary Education, (hereinafter referred to as the "BESE"), unfairly administered the Graduation Exit Exam as a requirement for graduation, in that, all graduating public high school students and all state approved non-public high school students were not required to take the GEE as a requirement to graduate and receive a high school diploma.

Interestingly, other students who are candidates for graduation, attending such state approved schools as non-public, receiving a General Educational Development Diploma, (hereinafter referred to as "GED"), participating in a home study program and subsequently re-enters the public school system are not required to take either part or all of the GEE prior to receiving a diploma. (Record p. 230, lines 15-30, p. 299-304, 308, 309).

Similarly, these students share and enjoy the same rights and privileges afforded students who have graduated from the public schools. Oddly, students who have matriculated in accordance with the required curriculum, with the exception of those students who have re-entered the public school system in the eleventh or twelfth grades, are not given any alternative to obtain a diploma unlike its counter parts, i.e., the approved non-public school students. Definitely, they must take and pass the GEE in order to receive his or her diploma.

Obviously, a disadvantaged inner-city youth, who already has a multitude of hurdles to jump in order to obtain a high school diploma, which, of course, will be further

frustrated if he or she is unsuccessful in passing the GEE.

However, on the other hand, those students who have a poor academic profile/record, can by attending state approved non-public schools or falling within the other exemptions will not be confronted with the GEE as a barrier simply because they are not required to take and pass the GEE. (Record p. 199, lines 11-14).

Accordingly, it is this requirement that the aforementioned petitioners take issue with, and as such, it is, therefore, arbitrary, unconstitutional, void and unenforceable.

Petitioners, as public high school students and citizens of both the State of Louisiana and the United States of America, made a prima facia showing during the preliminary hearing in proving that they had successfully completed the State's requisite standards for graduation (23 Carnegie Units) in accordance with the requirements of La. R.S. 12:6A(11). (Record p. 78-83).

Conversely, they have failed all or parts of the GEE in some cases by one mere point. Other public high school students and students who graduated from state approved non-public schools are only required to successfully complete the 23 Carnegie Units in order to receive a diploma.

The Louisiana Legislature authorized the administering of assessment tests in the 3rd, 7th, 9th and 11th grades. Although the law provides that BESE administer these tests only as assessment tools, BESE has arbitrarily changed the 11th grade test into a graduation

exit examination without legislataive authority and made it a sole criteria for graduation unlike any of the other assessment tests. Despite the Louisiana First Circuit's attempt to legitimize BESE's action, there was no legitimate purpose established at the preliminary hearing for administering the 11th grade test differently than the other three.

Thus, petitioners have been denied equal protection of their rights in the administration of the GEE as guaranteed by the *Fourteenth Amendment of the United States Constitution*, and consequently, are suffering irreparable harm because they are not graduating with their respective classes and, as such, will be prohibited from pursuing their life long dreams or goals, i.e., to attend college or seek employment. (Record p. 192). Thousands of Louisiana' public high school students will be in limbo on this issue unless this Honorable Court decides to review this most import matter.

The Louisiana District Court issued a preliminary injunction in concluding that the GEE was unfairly and discriminately administered against some public high school students who were otherwise qualified to graduate. However, the Louisiana First Circuit Court of Appeal reversed the lower court's ruling and the Louisiana Supreme Court denied Petitioners' Application for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE EXTENT TO WHICH, CONSISTENT WITH THE CONSTITUTION, GOVERNMENT CAN REQUIRE

DIFFERENT REQUIREMENTS FOR HIGH SCHOOL GRADUATIN AMONG SOME PUBLIC AND STATE APPROVED NON-PUBLIC HIGH SCHOOL STUDENTS WHERE STATE PROVIDES SUBSTANTIAL FUNDING AND CURRICULUM OVERSIGHT TO APPROVED NON-PUBLIC SCHOOLS.

This case presents the important question of whether application of State's 11th grade assessment test as a sole criteria for graduation for some of its public high school students while precluding other public high school students and all state approved non-public schools is unfair, arbitrary, and in violation of the equal protection clause of the *Fourteenth Amendment of the United States Constitution, Plyler v. Doe,* 457 U.S. 202 (1982), *Yick Wo v. Hopkins,* 118 U.S. 356.

The guarantee of equal protection applies to actions by both state and federal governments. *Fourteenth Amendment to the United States Constitution and Article I, Section 3, to the Louisiana Constitution of 1974. Spears v. Department of Corrections, et al,* 402 So.2d 203.

The mere fact that a Louisiana citizen is a public high school student does not justify unequal treatment with regard to receiving the same rights and privileges that are guaranteed to all the people by the *Fourteenth Amendment of the U. S. Constitution* and *Article VIII, Section 1 of the Louisiana Constitution of 1974.* The District Court concluded that the manner in which the eleventh grade assessment exam as administered violated the Equal Protection Clause of the United States and Louisiana Constitution.

It is important to note that the GEE was adopted or created as an administrative policy by the BESE without legislative authority. Accordingly, the Louisiana Legislature has not passed any statutes or legislation creating a GEE in Louisiana. In fact, when presented with GEE legislation, the legislature voted against implementation of a GEE in the State of Louisiana. (Exhibits p-6 and 7 legislative history), (Record p-125, lines 18-25). Louisiana Revised Statute 12:24.4(F) reads in pertinent part as follows:

> "The Department of Education shall begin implementation of a Louisiana Educational Assessment Program, with the approval of the State Board of Elementary and Secondary Education...A grade eleven criterion-referenced test shall be piloted no later than the 1987-1988 school year with implementation not later than 1988-1989..."

Specifically, the language contained in LA. R.S. 12:24.4(2) states that the Louisiana Educational Assessment Program "LEAP" was authorized by the Louisiana Legislature as a process of measuring pupil performance. It is the contention of the Petitioners that BESE exceeded the scope of its statutory authority in establishing yet another graduation requirement in order for a student to graduate from a public high school in Louisiana. Certainly, this standard is unfair and more stringent than those contained in the enabling legislation. (Record p. 128, lines 9-21).

It is interesting to note that the GEE was instituted without approval from the legislature, and, as such, the

criterion-referenced test was added to the curriculum of the eleventh graders as an additional graduation requirement in a secondary school in Louisiana.

There is adequate evidence in the record to support the District Court's finding that the GEE was created administratively by the defendant and administered unconstitutional.

In its opinion, the Louisiana First Circuit gives an extensive discussion to those first amendment rights regarding freedom of religion in attending schools of choice. However, the opinion is silent regarding the thousands of non-religious private schools in Louisiana that were created after the public school system was forced to integrate in the late seventy's and early eighty's. These private schools receive state funds and their graduates receive a diploma that has the full force and effect of a high school diploma. The opinion further fails to address the issue of the disparity between home study students who reenter the public high school system in the 12th grade and who are exempt from taking the GEE. Additionally, the opinion fails to discuss the unequal treatment between public high school students who have to take the GEE and students who receives a GED.

If you accept the language of the Louisiana First Circuit, in that, "BESE's authority is limited to the quality of the curriculum, i.e., whether the non-public school offers the 23 Carnegie Units, and only that, is to say that we are unconcerned with the non-public students whose parents are also responsible taxpayers and citizens of Louisiana. As to whether or not they have obtained a certain proficiency

level, as BESE indicated, then surely it is as important to determine if the non-public schools are receiving an equal education as well. Obviously, the BESE has administered the GEE unequally, and as such, has been derelict in fulfilling its function regarding whether or not a quality education is being taught in both public schools and approved non-public schools, regardless of the parents preference. In this regards it is not an infringement upon parents authority to choose schools of their choice.

Apparently, some of the students who are attending public schools are being penalized, because they are unable to pay tuition at private schools. Accordingly, it would seem that receiving a high school diploma in Louisiana boils down to who has the money to send his/her child or children to non-public schools. Essentially, the GEE has that kind of impact, and, as such, appear to be the policy for some students in Louisiana, if this injustice is allowed to continue to exist.

If the decision appealed from is allowed to stand without review and reversal, it would appear that our society rewards those who are financially able to attend non-public institutions in violation of the equal protection clause of the U. S. Constitutional.

Consider further that with the advent of the "Voucher System" a parent can send his/her child to either a public school or a state approved non-public school. Accordingly, if that child has failed the GEE in the 11th or 12th grade of the first semester, that person can transfer to an approved non-public school and as such, graduate on time. This in effect will literally destroy our national public

school system as we know it now. The cost of such an outcome, whether measured in human or economic terms, will surely be great.

II. THE LOUISIANA SUPREME COURT AND APPELLATE COURT IN DENYING PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI WHILE UPHOLDING THE CONSTITUTIONALITY OF THE CHALLENGED STATE ACTION, CONFLICTS WITH FEDERAL COURT AND STATE DISTRICT COURT ACTION.

A. The Holdings of *Crump v. Gilmer*

The decision which is the subject of this appeal is in direct conflict with a federal district court decision. Any high school student who has sucessfully fulfilled all requirements for a diploma but who has nevertheless been unsuccessful in passing the statewide competency examination *not required by statue* is entitled to a preliminary injunction requiring schools to permit them to participate in graduation ceremony, in light of threat of irreparable harm to students, lack of potential harm to public, and likelihood that competency examination would not withstand legal challenge on merits. (emphasis added). *Crump v. Gilmer Independent School District,* 797 F. Supp. 552 (E.D. Tex. 1992)

B. The Holdings of *Debra P.*

The Louisiana First Circuit Court's opinion attempts to compare this case with *Debra P. v. Turlington,* 644 F.2d 397. However, the court overlooked the fact that the State

of Florida, unlike Louisiana, has repealed all of its laws pertaining to governing and approving curriculums for non-public schools at the time the Fifth Circuit rendered its decision in Debra P. The opinion also fails to make reference to the fact that the Court noted in the Debra P. case that the State of Florida, unlike the State of Louisiana, did not provide any funding to non-public schools. The record of this case demonstrates that Louisiana provides million of dollars to approved non-public schools. Additionally, the opinion does not take into consideration that the GEE in the State of Florida is authorized by the state legislature through statutes. Furthermore, the First Circuit failed to give consideration to the fact that the Florida Legislature enacted legislation wherein students who failed to pass the GEE were given certificates that allowed them to continue their life pursues. All of these factors were before the Fifth Circuit in the Debra P. case, however, they are non-existent in this case.

The Louisiana First Circuit Court joined the U. S. Fifth Circuit Court but not on common ground in violation of the rights of public school students in Louisiana to have a fair and impartial hearing.

III. THE DECISIONS OF THE LOUISIANA SUPREME COURT AND THE LOUISIANA FIRST CIRCUIT COURT OF APPEALS ARE ERRONEOUS.

Both the Louisiana Supreme Court and Louisiana First Circuit Court of Appeal erred in upholding the unfair and discriminatory administration of the GEE and in failing to determine whether it is arbitrary and capricious.

The Louisiana District Court was not clearly erroneous in finding that the GEE was unconstitutional as administered. District Court's findings of facts and the inferences drawn therefrom, are clearly erroneous only when the reviewing court considers the entire evidence thus leaving them with a definite and firm conviction that a mistake has been committed.

The fact of the matter is that there is no legislation giving BESE the authority to arbitrarily change the 11th grade LEAP test into a GEE. The legislature cannot lodge "unfettered discretion" with an administrative officer. *Schwegmann Brothers Giant Super Markets v. McCory,* 112 So. 2d 606 at 614. In doing so, the legislature unconstitutionally surrenders the legislative power itself.

This is particularly important when considering the fact that the Louisiana legislature could not resolve this controversial issue in terms of adopting the GEE as a requirement for obtaining a state high school diploma. Of course, this indecision on the part of the legislature, in and of itself, shows that it expressed an intent not to provide legislation nor a statute establishing the GEE as a graduation requirement. *Board of Elementary and Secondary Education v. Nix,* 347 So.2d 147 at 152.

The respondent unsuccessfully tried to prove a legitimate state purpose at the trial of this matter. However, the petitioners proved at the trial on the merits that the State of Louisiana has an interest in public and approved non-public schools both financially and as mandated by the Louisiana Constitution which is to ensure that all its citizens receive an education. The defendant unsuc-

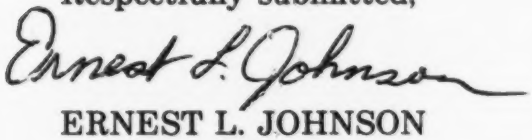
cessfully tried to establish a legitimate state purpose for the GEE. The only purpose proven by the respondent for creating the GEE and requiring passage thereof was to give greater recognition to the high school diploma. (Record, p. 160, lines 19-27). Petitioners submit that this is not an express legitimate purpose by the State of Louisiana through its legislature nor is it a legitimate purpose under any circumstances.

In an effort to mitigate the inequities brought by the First Circuit's judgment, it is, therefore, imperative to review this petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

JUDGMENT - WITHOUT ORAL ARGUMENT

April 12, 1994

No. 94-C - 0783 - Judge Joseph Keogh

Before:

Hon. Pascal Calogero, Jr.
Hon. Walter F. Marcus, Jr.
Hon. Jack C. Watson
Hon. Harry T. Lemmon
Hon. Pike Hall, Jr.
Hon. Catherine Kimball
Hon. Revius O. Ortgique

IN RE: Rankins, Tarchia; Yancy, Chad; Hicks, Sonovia; Williams, Sekari; Beauchamp, Kawanda; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA93 1879; Parish of East Baton Rouge Nineteenth Judicial District Court Div. "M" Number 394,923

Denied.

Hon. Dennis, J., not on panel.

APPENDIX B

IN THE STATE OF LOUISIANA
COURT OF APPEAL FIRST CIRCUIT

No. 93-C - 1879 - Judge Joseph Keogh

Before:

Hon. Lottinger
Hon. Carter
Hon. Crain
Hon. LeBlanc
Hon. Whipple

TARCHIA RANKINS, et al

Appellees

v.

LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION LOUISIANA

Appellant

UNPUBLISHED OPINION AND ORDER

The subject of this litigation is Louisiana's graduation exit examination (GEE) which has been a requirement for obtaining a state high school diploma since 1989. The five plaintiffs in this case, all Louisiana public school

students, failed to pass the GEE before the end of their senior year in high school. They have all accumulated the required 23 Carnegie units[1] necessary for graduation but, because of their failure to pass the GEE, they have not received their respective diplomas. Plaintiffs filed this suit seeking the award of their high school diplomas and a declaration as to the invalidity of the Board of Elementary and Secondary Education's (BESE) GEE policy.

Following a hearing, the trial judge issued a preliminary injunction prohibiting BESE from withholding the plaintiffs' state high school diplomas despite their failure of the GEE. In his written reasons for judgment, the judge stated that the GEE has been unconstitutionally administered in violation of the equal protection clause of the United States and Louisiana Constitutions. From this judgment, BESE appeals.

The central issues raised by this appeal are:

(1) whether BESE has authority to establish the GEE as a graduation requirement; and

(2) whether the GEE is being administered in violation of the equal protection clause.

BESE'S AUTHORITY

Plaintiffs assert that BESE exceeded the scope of its

---

[1] Prior to implementation of the GEE, the only academic requirement for high school graduataion was the successful completion of 23 Carnegie units. The required units presently consist of 4 units of English, 3 units of mathematics, 3 units of science, 3 units of social studies, 2 units of health and physical education, ½ unit of computer literacy, and 71/2 units of electives. Louisiana Department of Education, Louisiana Handbook for School Administrators (revised November 1992).

authority in adopting the GEE because the legislature did not specifically authorize a graduation exit exam. For the reasons assigned below, we conclude that BESE has authority to establish the GEE as a requirement for obtaining a state diploma.

Article VIII Section 3(A) of the Louisiana Constitution provides that:

> The State Board of Elementary and Secondary Education is created as a body corporate. it shall supervise and control the public elementary and secondary schools, vocational-technical training and special schools under its jurisdictioin and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law. The board shall have other powers, duties, and responsibilities as provided by this constitution or by law, but shall have not control over the business affairs of a parish or city school board or the selection or removal of its officers and employees.

The Louisiana Supreme Court, in *Aguillard v. Treen*, 440 So.2d 704, 708 (La. 1983), concluded thAt This constitutional provision is not self-executing. Thus, BESE's supervision and control of public elementary and secondary education is not unfettered, but is subject to the laws passed by the legislature[2] *Id.* We therefore look to legislative

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[2] In answering a certified question from the United States Fifth Circuit Court of Appeals, the *Aguillard* court discussed the meaning the phrase "as provided by law" contained in La. Const. art. VIII Section 3(A). The court concluded that according to this phrase, "the Board shall super-

enactments in search of BESE's authority to establish the GEE.

The legislature set forth the general powers of BESE in La. R.S. 17:6. This statute contains numerous grants of specific powers as well as the following general provision:

> A. In the exercise of its supervision and control over the public elementary and secondary schools, vocational-technical and postsecondary vocational-technical schools and programs except in colleges and universities, and special schools under its jurisdiction, and in the exercise of its budgetary responsibility for all funds appropriated or allocated by the state for public elementary and secondary schools, vocational-technical and post-secondary vocational-technical programs and schools placed under its jurisdiction, the board shall have authority to:
>
> ...
>
> (15) perform such other functions as are necessary to the supervision and control of those phases of education under its supervision and control.
>
> ...

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footnote 2 continued

vise and control the public elementary and secondary schools as provided 'by the legislature' or 'by statute.' " *Id.* at 708, *see also Board of Elementary and Secondary Education v. Nix*, 347 So.2d 147, (La. 1977) (the Louisiana Supreme Court interpreted La. Const. art. VIII Section 3(A) to mean that although the legislature shall provide by law for the supervision, control, and budgetary power of the board, the legislature cannot regulate and limit BESE's constitutional grant of power to supervise, control, and budget education.)

Under this grant of general power and in the absence of specific legislation regarding the development of a ggraduation exit exam, BESE retains the authority to establish the GEE.

In brief, plaintiffs assert that BESE exceeded its authority because "the legislature did not express the intent in [La. R.S. 17:24.4] that the eleventh grade criterion-referenced test was to be administered as a graduation exit exam." The pertinent parts of this statute provide:

> A. (2) "The Louisiana Educational Assessment Program" means a process of measuring pupil performance in relation to grade appropriate skills, state curriculum standards, and national indices.
>
> ....
>
> F. The Department of Education shall begin implementation of a Louisiana Educational Assessment Program, with the approval of the State Board of Elementary and Secondary Education....A grade eleven criterion-referenced test shall be piloted no later than the 1987-1988 school year with implementation no later than 1988-1989.

La. R.S. 17:24.4.

While plaintiffs are correct in their assertion that the statute is devoid of legislative intent regarding graduation exit exams, this silence does not imply that BESE exceeded the scope of its authority. Under La. R.S. 17:6(A) (15),

BESE has broad powers to perform such funtions are necessary for the supervision and control of public education. Because the legislature has not expressed a contrary intent[3], BESE retains the power under this statute to implement the GEE as a graduation requirement.

For the foregoing reasons, we conclude that BESE has authority to establish the GEE as a requiraement for obtaining a state high school diploma. Having reached this conclusion, we now consider whether BESE's administration of the GEE violates the equal protection clause.

EQUAL PROTECTION

In challenging BESE's GEE policy, plaintiffs note that students, and persons obtaining a General Educational Development Diploma (GED), are not required to take the GEE prior to receiving a state diploma. On the other hand, public school students must successfully complete the 23 Carnegie units and pass the GEE before obtaining a state diploma. Based on this uneven administration of the GEE, the trial judge concluded "that the

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[3] House Concurrent Resolution 204 of 1989 provides some evidence of the legislature's intent reagarding the GEE. In April of 1989, BESE adopted a resolution requiring all Louisiana students, public and nonpublic, to pass the GEE before obtaining a state high school diploma. In response to this resolution, the legislature adopted House Concurrent Resolution 204 which expresses the legislaature's intent to limit the applicability of the GEE to public school students. Following this action by the legislature, BESE adopted a new policy which stated that the GEE would be mandatory for public students and optional for nonpublic students.

This resolution is significant in that that legislature did not disapprove of BESE's plans to make the GEE a requirement for Louisiana's public school students.

Graduate Exit Exam (GEE) has been unconstitutionally administered in violation of the Equal Protection Laws of the Fourteenth Amendment of the U. S. and Louisiana Constitution[s]."

After a careful review of the applicable constitutional provisions an jurisprudence, we conclude that the trial judge erred in holding that the GEE is being administered in violation of the equal protection clause.

A. BESE's Authority Over Non-public Schools

We first consider the scope of BESE's authority over non-public schools. La. Const. art. VIII Section 4 given BESE the limited power to approve "a private elementry, secondary, or proprietary school with a sustained curriculum or specialized course of study of quality at least equal to that prescribed for similar public schools...." According to the testimony of Louisiana State Superintendent of Education, Raymond G. Arveson, the key factor in approving a non-public school is whether the school offers the 23 Carnegie units. In granting or withholding approval. BESE may only compare the quality of the curriculum of the non-public school with the mandated curriculum of the public schools. This limited constitutional authority to approve non-public schools does not empower BESE to mandate the contents of the courses taught or to require that the students pass the GEE prior to graduation.

Bese's authority over non-public schools is further constrained by the United States Constitution. The United States Supreme Court has held that the First and Four-

teenth Amendments prevent the state from intruding into family decisions in the areas of religious freedom and parental control over the rearing of children.

The right of parents to choose the means and methods whereby their children may be educated free from unreasonable or excessive government interference is a liberty protected by the Fourteenth Amendment. In *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571 (1925), the Court set forth the following:

> Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 360, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1466, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 534-35.

The Court reaffirmed the constitutional right of

parental choice in *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Therein the Court acknowledged that the state may "impose reasonable regulations for the control and duration of basic education." *Id.* at 213. However, the Court limited this power by observing that reasonable regulations must "yield to the right of parents to provide an equivalent education in a privately operated system." *Id.* The Court then concluded:

> [t]hus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce,* "prepare [them] for additional obligations.

Id. at 214.

Under these constitutional proscriptions, BESE cannot dictate the curriculum or set exit exam requirements in non-public schools without infringing upon the rights of parents who choose to send their children to non-public schools or who choose religious over public education.

B. The Holdings of *Debra P.*

The seminal case in the area of exit exams under similar circumstances in Florida. *Debra P.* a group Florida high school students challenged the validity of the Florida

State Student Assessment Test which was a condition for receipt of a high school diploma.[4] The Fifth Circuit held that there was no equal protection violation merely because the exit exam was applied only to public school students. *Id.* at 406. Citing *Ambach v. Norwich,* 441 U.S. 68, 77, 99 S.Ct. 1589, 1595, n.8, 60 L.Ed.2d 49, 57 (1979), the court stated, "the state need not correct all the problems of education in one fell swoop and it has a stronger interest in those for which it pays the cost" *Id.* at 406-07.

A second holding in the *Debra p.* case is that an exit exam cannot be made a requirement for graduation unless it is specifically tied to the curriculum taught in the schools.[5] *Id.* at 406. This is known as criterion-referenced examination. The requirement that exit exams be criterion referenced is necessary to avoid equal protection problems which may arise if the test attempts to gauge general knowledge and is consequently biased because of social and noneducational factors.

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[4] Plaintiffs attempt to distinguish the *Debra P.* case from the present case by noting that "the Louisiana State Legislature has expressed no interest in the implementation of a graduation exit exam which is different from the State of Florida." In light of our conclusions in the first portion of this opinion, this distinction does not affect the application of the *Debra P.* holdings to the facts of this case.

[5] The Fifth Circuit remanded the case to hear evidence on whether Florida's exit exam tested materials actually taught in Florida's public schools and to determine whether the exam had a racially discriminatory impact. *Id.* at 408.
Following the district court's decision on remand, the case was appealed to the Eleventh Circuit Court of Appeals. *Debra P. v. Turlington,* 730 F.2d 1405 (11th Cir. 1984). The Eleventh Circuit affirmed the district court's findings that the Florida students were taught tested skills, that the exam did not discriminate, and that the exam would help remedy the vestiges of past segregation. *Id.* at 1416-17.

According to *Debra P.*, the state may impose an exit exam requirement on students without violating equal protection, provided the exam is specifically tied to the curriculum. The GEE is a five part, criterion referenced exam which tests skills from Louisiana's mandated public school curriculum. The English Language Arts, Written Composition, and Mathematics portions of the GEE are first administered in the 10th grade. Students who fail any of these portions may retake them in the 11th and 12th grades. The Science and Social Studies portions are first given in the 11th grade and may be retaken in the 12 grade.[6] Remediation is offered for students who have failed any section of the GEE. Remediation and testing remain available to students after completion of their high school curriculum.

The GEE requirement applies to public high school students with exceptions for home study students[7], persons who obtain a GED,[8] and non-public school students[9]. These limited exceptions are not arbitrary, but rather are mandated by the holding of *Debra P.* which prohibits the state from requiring passage of an exit exam unless the

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[6] Students are afforded four opportunities to take and pass the Science and Social Studies portions of the exam and they have six opportunities to take and pass the other sections.

[7] Home study students who return to the public school system in the eleventh grade are not required to take three of the five parts of the GEE and students returning in the twelfth grade are not required to take any part of the exam.

[8] Persons obtaining a GED are not required to take any part of the GEE.

[9] Persons obtaining a GED are not required to take any part of the GEE.

exam tests the content of subjects actually taught in the schools.

As discussed above, the Louisiana and U. S. Constitutions prohibit BESE from dictating the contents of the curriculum in non-public schools and in home study programs. Thus, requiring these students to pass a test covering materials that were not necessarily taught, clearly violates the rule of *Debra P.*. Additionally, because *Debra P.* mandates that exit exams be criterion referenced, persons who obtain a GED cannot be required to pass the GEE which is based on the curriculum taught in Louisiana's public schools.

In sum, because BESE cannot mandate the content of the curriculum taught in non-public schools or in home study programs and because *Debra P.* requires that exit exams be criterion referenced, BESE cannot require that non-public students, home study students, or persons obtaining a GED pass the GEE prior to receiving a state diploma.

C. The Rational Relationship Standard

In analyzing equal protection claims, the courts have established three standards of review. *Sibley v. Board of Supervisors of Louisiana State Universitsy,* 477 So.2d 1094, 1107 (La. 1985) (on rehearing). When legislative enactments classify persons by race or religious beliefs, the strict scrutiny standard is applied. For classifications based on birth, age, sex, culture, physical condition, or political ideas or affiliations, an intermediate standard of review is appropriate. All other classifications are analyzed under the rational relationship standard.

In the present case, the classification of public versus non-public school students[10] does not involve any of the suspect or intermediate classifications recognized under the Equal Protection analysis. Thus, the rational relationship standard is the proper standard of review. Under this standard the challenger must establish that the legislative classification at issue is not rationally related to any legitimate state purpose. *Pierre v. Administrator, Louisiana Office of Employment Security,* 553 So. 2d 442, 447 (La. 1989).

In applying the rational relationship standard in *Debra P.,* the court held that the exit exam bears a rational relation to Florida's valid interest of insuring the functional literacy of its graduating students. *Debra P.,* 644 F.2d at 406. In the present case, the state of Louisiana has a valid interest of insuring the minimum competency of persons obtaining a state diploma. The GEE bears a rational relationship to this goal by insuring that students who obtain a state diploma have reached the required level of competency. We also note that BESE's policies regarding remediation and retesting further the state's interests by providing failing students an opportunity to achieve the required level of competency.

Plaintiffs suggest that because approved non-public schools receive state funding, the state also has an interest in the quality of education in those non-public schools. The United States Supreme Court has recognized that limited

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[10] There is no evidence in the record which attempts to set forth the number of non-parochial schools in Louisiana vis a vis parochial schools. Therefore, under the equal protection analysis, the students are classified as public versus no-public.

financial assistance to non-public school students is permissible provided it does not create an excessive government entanglement with the non-public schools. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct.2105 (1971). Limited funding to non-public school students does not authorize the state to impose curriculum or graduation requirements on non-public school students. Any attempt to establish the GEE requirement in a non-public school would be an "excessive entanglement" and thus, violate the First Amendment of the United States Constitution.

Although the state provides certain funds for services which directly assist students in non-public schools, we join the *Debra P.* court in acknowledging that the state has a stronger interest in public education for which it pays the costs. We conclude that the GEE does not violate the equal protection clause because it's administration is rationally related to the state's legitimate interest of insuring minimum competency among persons obtaining a state diploma.

CONCLUSION

For the foregoing reasons, we conclude that BESE has the authority to establish the GEE as requirement for obtaining a state high school diploma and that BESE's administration of the GEE does not violate the equal protection clause. Accordingly, we reverse that portion of the trial court's judgment which states that the GEE violates the equal protection clause and we vacate the preliminary injunction issued with respect to the plaintiff's diplomas. Costs of this appeal are assessed against plaintiffs.
REVERSED AND RENDERED.

APPENDIX C

IN THE STATE OF LOUISIANA
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON

No. 394.923 Div. "M" - Judge Joseph Keogh

TARCHIA RANKINS, et al

Petitioners

v.

LOUISIANA STATE BOARD OF
ELEMENTARY AND SECONDARY EDUCATION
LOUISIANA

Defendant

WRITTEN JUDGMENT

This cause came on for hearing on the 16th day of June, 1993 on Plaintiffs' Petition for a Declaratory Judgment and Injunctive Relief.

PRESENT: Ernest Johnson and
Ronald R. Johnson, Attorneys for
plaintiffs
Tarchia Rankins, et al.

Roy Mongrue and
Beth Conrad, Attorneys for the defendants State of Louisiana, Board of Elementary and Secondary Education.

IT IS ORDERED, ADJUDGED AND DECREED that the Graduate Exit Exam (GEE) has been unconstitutionally administered in violatiion of the Equal Protection Laws of the Fourteenth Amendment of the U.S. and Louisiana Constitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that the defendants be enjoined, prohibited, and restrained from denying plaintiffs their high school diploma.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that irreparable injury to plaintiffs has been, and continues to be that defendants are requiring them to perform an unconstitutionally administered test in order to receive their high school diplomas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Rule issued herein be made absolute, and accordingly that a preliminary writ of injunction issue herein, as prayed for, and in accordance with law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the bond amount of $ 500.00 previously posted by plaintiffs is satisfactory and sufficient for the issuance of this injunction.

JUDGMENT RENDERED on the 18th day of June, 1993, **READ AND SIGNED** this 8th day of July, 1993, Baton Rouge, Louisiana.

Joseph Keogh, Judge
19th Judicial District Court

APPENDIX D

IN THE STATE OF LOUISIANA
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON

No. 394.923 Div. "M" - Judge Joseph Keogh

TARCHIA RANKINS, et al

Petitioners

v.

LOUISIANA STATE BOARD OF
ELEMENTARY AND SECONDARY EDUCATION
LOUISIANA

Defendant

WRITTEN REASONS FOR JUDGMENT

The Board of Elementary and Secondary Education (BESE) has been given the authority to enact certain educational policies under Article 8, Section 3(A) of the Louisiana Constitution of 1974. Specifically, the article reads as follows:

> The State Board of Elementary and Secondary Education is created as a body corporate. It shall supervise and control the public elementary and

> secondary schools, vocational-technical training and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, as provided by law. The board shall have other powers, duties, and responsibilities as provided by this constitution or by law, but shall have no control over the business affairs of a parish or city school board or the selection or removal of its officers and employees.

In 1990 BESE implemented a new policy whereby graduating seniors had to take and pass all five sections of a Graduate Exit Exam (GEE) in order to receive a high school diploma. Five public school students who failed part(s) of the exam filed suit for injunctive relief alleging that the GEE was not uniformly administered and that BESE was thus violating their equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitutiion, Article 1, Section 3 of the Louisiana Constitutions. After considering the briefs submitted by counsel for both sides and hearing a full day of testimony, this Court finds that the manner in which the GEE is administered is indeed a violation of the equal protection clause.

Under Articale 8, Section 4 of the Louisiana Constitution, BESE has limited authority over non-public schools in the state. BESE may approve or disapprove non-public schools which apply for approval on the basis that they do or do not have a "sustained curriculum or specialized course of study of quality at least equal to that prescribed for similar public schools." Approved non-

public school students receive a BESE diploma upon graduation from high school which affords them the same privileges, such as admission to certain state colleges, as public school students receiving BESE diplomas. Until 1990, the major criterion for approval was the requirement that high school students complete twenty-three Carnegie units to graduate. Since 1990, public school students must also successfully pass all five sections of the GEE to receive a BESE diploma, but some approved non-public schools which receive limited state funding are not required to administer the GEE before their students receive a BESE diploma. Additionally, home study students who return to the public school system in twelfth grade are not required to take the test at all. This Court views such an uneven administration of the test as a violation of the equal protection clause.

The standard for granting an injunction is irreparable injury. The irreparable injury to these five plaintiffs is that they have been denied their high school diplomas despite successfully completing twenty-three Carnegie units based upon an unconstitutionally administered exit exam. Indeed there are over five hundred public school students similarly situated in this state. There is evidence to suggest that some have been denied admission to college, some have had scholarship offers withdrawn, and some cannot get jobs that require a high school diploma. Meanwhile, other students who have likewise passed the twenty-three Carnegie units but either have not taken the GEE or have not taken all of it have received BESE diplomas and have proceeded on with their lives.

Therefore, it is the ruling of this Court that a preliminary injunction issue preventing BESE from withholding BESE diplomas from these plaintiffs.

Written judgment in compliance with these written reasons will be signed upon presentation to this court.

Baton Rouge, Louisiana, this 22nd day of June, 1993.

Joseph Keogh, Judge
19th Judicial District Court